

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

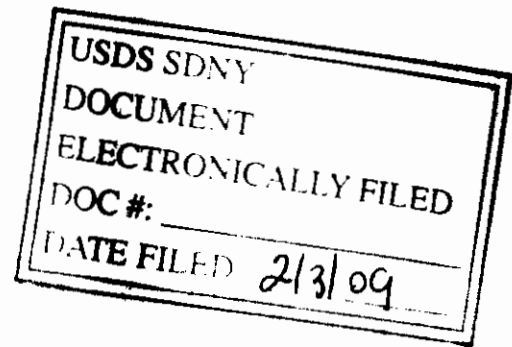
DOMINGO ESPIRITU,

Petitioner,

-v-

MS. HAPONIK, Superintendent, Green Haven
Correctional Facility,

Respondent.



No. 05 Civ. 7057 (RJS)
ORDER

RICHARD J. SULLIVAN, District Judge:

On August 9, 2005, Petitioner commenced this action for habeas corpus relief pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) The form petition indicates that, on December 21, 2004, Petitioner filed a motion pursuant to New York's Criminal Procedure Law § 440.10, in which he argued that his trial counsel was constitutionally ineffective (the "§ 440.10 motion"). (Doc. No. 1 at 4.) The petition further indicates that the § 440.10 motion was denied on June 17, 2005. (*Id.*) However, in response to a question on the form petition regarding whether Petitioner had exhausted his state appellate remedies relating to the ruling on that motion, Petitioner indicated that he had not done so. (*Id.* at 5.)

Because of that response, on January 26, 2006, the Honorable Kenneth M. Karas, District Judge, entered an Order to Show Cause directing Petitioner to demonstrate by February 24, 2006 why his petition should not be dismissed for failure to exhaust his state appellate remedies. (Doc. No. 3.) Petitioner did not meet that deadline, and Judge Karas entered a second Order to Show Cause on April 12, 2006, which directed Petitioner to respond by May 19, 2006. (Doc. No. 4.)

The docket sheet reflects that the Clerk of the Court subsequently received an undated

submission titled "Answer To 'Order To Show Cause' and Request to Amend/Supplement Petition," which includes a certificate of service dated May 18, 2006. (Doc. No. 5.) In that submission, Petitioner represented that his petition contained a typographical error, and that he had, in fact, appealed both his conviction and the denial of his § 440.10 motion "to the highest state courts and argued violations in his letters of application to both of these courts." (*Id.* at 3.) Based on his representation that the error was clerical in nature, Petitioner requested permission to amend his petition to indicate that he had exhausted his state appellate remedies. (*Id.* at 4-5.)

Apparently on the same date that Petitioner served his "Answer" to the April 12, 2006 Order to Show Cause, he also mailed a May 18, 2006 letter to Judge Karas requesting an extension of time in which to respond to the Order. (Doc. No. 6.) On June 7, 2006, Judge Karas endorsed Petitioner's May 18, 2006 letter and granted him an additional sixty days from that date to respond to the still-pending Orders to Show Cause. (*Id.*)

This matter was reassigned to the undersigned on September 4, 2007. As of February 3, 2009, Petitioner has neither submitted additional materials to the Court to demonstrate that he exhausted his state appellate remedies, nor otherwise responded to Judge Karas's June 7, 2006 directive. Nevertheless, in light of his *pro se* status, as well as the apparent confusion regarding the timing of his correspondence to Judge Karas, the Court will treat Petitioner's undated "Answer" regarding the exhaustion of state appellate remedies as responsive. Based on the representations in that submission, Petitioner's request to amend his petition is GRANTED.

IT IS HEREBY ORDERED THAT Petitioner shall file an Amended Petition with the Clerk of the Court by March 9, 2009.

IT IS FURTHER ORDERED THAT, by May 4, 2009, Respondent shall file a Notice of

Appearance and a response to the Amended Petition.

IT IS FURTHER ORDERED THAT, in connection with her submission, Respondent shall submit transcripts of all relevant proceedings, the appellate briefs relating to Petitioner's conviction, the record from all post-conviction proceedings, and any relevant appellate decisions relating to the challenged conviction.

IT IS FURTHER ORDERED THAT Petitioner shall file his reply within thirty (30) days of the date on which he is served with Respondent's response.

The Clerk of the Court is respectfully directed to serve, by certified mail, a copy of this Order, the petition, and the supporting documents contained in the Clerk's file, upon:

Domingo Espiritu, 00-A-6162, Green Haven Correctional Facility, P.O. Box 4000,
Suite 216, Stormville, New York 12582;


Andrew Cuomo, Attorney General of the State of New York, Law Department, 120
Broadway, New York, New York 10271; and

Robert Morgenthau, District Attorney, New York County, 1 Hogan Place, New York,
New York 10013.

Upon the filing of Petitioner's Amended Petition, the Clerk of the Court is further respectfully directed to serve, by certified mail, a copy of that document upon Messrs. Cuomo and Morgenthau at the addresses listed above.

SO ORDERED.

Dated: February 3, 2009
New York, New York



RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE